NO. 48633-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ROBERT MICHAEL BELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00166-4

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court is authorized to modify Legal Financial Obligations (LFOs) in the judgment and sentence when ordering an offender to serve a term of total confinement under RCW 9.94A.660(c) due to failure to comply with the terms of a Residential Drug Offender Sentence Alternative (DOSA)?
2. Whether Bell's appeal of LFOs imposed at sentencing on Dec. 10, 2014 is properly before this Court when Bell failed to file a notice of appeal within 30 days of the judgment and did not file a motion to extend time?

II. STATEMENT OF THE CASE

On Aug. 8, 2013, Bell entered a Drug Court contract to resolve drug possession charges under Clallam County Superior Court causes 14-1-00281-4 and 14-1-00166-4. CP 69, 75; RP 3 (8/13/14). Bell voluntarily opted out of the drug court program and the cases were remanded to the trial court on Nov. 19, 2014. CP 68.

Then, on Nov. 19, 2014, Bell entered a plea of guilty to three counts of Possession of a Controlled Substance which occurred on separate dates. CP 46. On Dec. 10, 2014, Bell was sentenced to a Residential (DOSA) under RCW 9.94A.660. CP 51. The sentencing court imposed the following LFOs: $500 victim assessment fee, $200 court costs, $500 court appointed attorney

reimbursement fee, $100 DNA fee, and a $1000 contribution to the Drug Court program and $1000 contribution to the Drug Enforcement Fund of Olympic Peninsula Narcotics Enforcement Team. CP 53–55. Bell did not object to any of the sentencing provisions. RP 4 (12/10/14).

Over a year and two months later, on Feb. 19, 2016, Bell admitted to violating the conditions of his sentence and the trial court revoked the Residential DOSA. CP 24, 25–26. On Feb. 23, 2016, the court imposed a standard range sentence of 12 months plus 1 day on all three counts and a 12 month term of community custody. CP 13. Defense counsel pointed out that Bell had served almost all of his 12 months and a day sentence already while in custody, in treatment, and on community custody. RP 4 (2/23/16).

Also on Feb. 23, 2016, Bell, through his attorney, objected to discretionary LFOs. RP 4 (2/23/16). The court declined to change any LFOs which were imposed at sentencing on Dec. 10, 2014. RP 6–7 (2/23/16).

> With regard to the legal financial obligations issue, if this were the first time the Court were considering those issues I think that consideration of the statutes that your attorney cited to, might be appropriate. However, the Court's already addressed these back on December 10th of 2014 and I'm not really sure there's a basis for revisiting the numbers that were ordered in that particular judgment and sentence. I confess that I don't know if that preceded Blazina or was after Blazina, but suffice it to say that in the December 10th, 2014, judgment and sentence, $3300.00 was imposed and included the drug funds. So, I am going to just essentially carry those over from the 2014 judgment and sentence to this one.

RP 6–7 (2/23/16).

III. ARGUMENT

A. UNDER RCW 9.94A.660, THE TRIAL COURT'S AUTHORITY TO MODIFY A JUDGMENT AND SENTENCE IS LIMITED TO CONDITIONS OF COMMUNITY CUSTODY OR IMPOSING A TERM OF TOTAL CONFINEMENT AND COMMUNITY CUSTODY.

The trial court imposed a standard range sentence and imposed a new term of community custody because the defendant was terminated from the DOSA program for violations of sentence conditions. *See* RP 2 (2/23/16), RP 2–4 (2/19/16), CP 24.

It appears as if Bell assumes this process was a new sentencing or re-sentencing or as a process in which terms of the DOSA sentence other than the standard sentence range and community custody were subject to modification. *See* RP 3 (2/19/16), RP 2–7 (2/23/16).

The trial court does not have authority to modify LFOs when imposing a term of total confinement for failing to complete the DOSA program. The court's authority to modify the sentence is limited by the Sentence Reform Act (SRA).

"SRA sentences may be modified only if they meet the requirements of the SRA provisions relating directly to the modification of sentences." *State v. Shove*, 113 Wn.2d 83, 89, 776 P.2d 132 (1989). "'[T]he existence of

express provisions within the SRA for modifying a sentence precluded the implication of others.'" *State v. Harkness*, 145 Wn. App. 678, 685, 186 P.3d 1182 (2008) (quoting *State v. Brown*, 108 Wn. App. 960, 962, 33 P.3d 433 (2001)).

"RCW 9.94A.660 allows the court to give a DOSA at initial sentencing, but does not provide for modification to a DOSA. '*Shove* 'leaves no room for inherent authority to be exercised by the sentencing court.'"" *Harkness*, 145 Wn. App. at 686 (quoting *State v. Murray*, 118 Wn. App. 518, 524, 77 P.3d 1188 (2003))(referring to *State v. Shove*, 113 Wn.2d 83, 89, 776 P.2d 132 (1989)).

The sentencing court's authority to modify a Residential DOSA after finding a defendant violated sentence conditions is limited under RCW 9.94A.660 (7) and RCW 9.94A.664 (4). "The court may bring any offender sentenced under this section back into court at any time on its own initiative to evaluate the offender's progress in treatment or to determine if any violations of the conditions of the sentence have occurred." RCW 9.94A.660 (7)(a). "If the offender is brought back to court, the court may modify the conditions of the community custody or impose *sanctions under (c)* of this subsection." RCW 9.94A.660 (7)(b) (emphasis added); *see also* RCW 9.94A.664 (4).

The court may order the offender to serve a term of total confinement

> within the standard range of the offender's current offense at any time during the period of community custody if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.

RCW 9.94A.660 (7)(c); *see also* RCW 9.94A.664 (4)(c).[1]

The DOSA statute expressly characterizes the imposition of a term of total confinement within the standard sentence range as a *sanction* although trial courts often refer to this as a DOSA revocation. *See* CP 9, 24. This sanction of a term of total confinement within the standard range is imposed upon "failure to complete, or administrative termination from, the special drug offender sentencing alternative program. . . ." RCW 9.94A.660 (8).

There is nothing under RCW 9.94A.660 or RCW 9.94A.664 that grants the trial court additional authority to modify the LFOs imposed under a DOSA sentence when the court imposes a sanction for failure to complete a DOSA.

Therefore, the trial court's sanction for failing to the complete the DOSA was not a "re-sentencing" in which the LFOs were re-imposed. The court only imposed a sanction: a standard range sentence and a term of community custody with standard conditions.

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[1] At a progress hearing or treatment termination hearing, the court may: . . . (b) Continue the hearing to a date before the expiration date of community custody, with or without modifying the conditions of community custody; or (c) Impose a term of total confinement equal to one-half the midpoint of the standard sentence range, followed by a term of community custody under RCW 9.94A.701.

B. BELL'S APPEAL OF LFOs IMPOSED AT SENTENCING IS TIME BARRED AND THERE WAS NO MOTION TO EXTEND TIME TO FILE NOTICE OF APPEAL.

Bell's appeal essentially depends on the assumption that the sanction process on Feb. 23, 2016, for failure to complete the DOSA, is a completely new sentencing in which LFOs were re-imposed and are therefore appealable. This assumption is necessary in order to appeal the LFOs imposed under the Dec. 10, 2014 DOSA sentence because notice of appeal was never filed after the Dec. 10, 2014 sentence.

This assumption is incorrect because the trial court on Feb. 23, 2016 had no authority to modify the judgment and sentence beyond modifying community custody conditions or imposing a term of total confinement and community custody under RCW 9.94A.660 (7)(c) or RCW 9.94.664 (4)(c). The trial court apparently took this position when it stated on Feb. 23, 2016, that it was not changing the LFOs imposed in the judgment and sentence entered Dec. 10, 2014 because the court was not sure it had authority to do so. RP 6–7 (2/23/16).

> Notice of Appeal. Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e).

RAP 5.2 (a).

> Restriction on Extension of Time. The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration. The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section. The motion to extend time is determined by the appellate court to which the untimely notice, motion or petition is directed.

RAP 18.8 (b).

Neither Bell nor his attorney objected to the discretionary LFOs imposed at the Dec. 10, 2014 sentencing. Bell did not file a notice of appeal within 30 days of his DOSA sentence imposed on Dec. 10, 2014. Furthermore, Bell has not moved for an extension of time to file notice of appeal and Bell has not argued that the imposition of the discretionary LFOs constituted a gross miscarriage of justice. Therefore, the State requests the Court to dismiss Bell's appeal as it is not properly before the Court.

IV. CONCLUSION

The State concedes that the sentencing court did not inquire into Bell's ability to pay discretionary LFOs at sentencing on Dec. 10, 2014. However, Bell may not use the sanction process on Feb. 23, 2016 for DOSA violations as a reference point on which to appeal LFOs imposed over a year prior because the trial court did not modify or re-impose the LFOs and did not have authority to do so. Finally, Bell never filed a notice of appeal after

the Dec. 10, 2014 sentence and did not file a motion to extend time.

Therefore, Bell's appeal of LFOs imposed on Dec. 10, 2014 is not properly before the Court and should be dismissed.

Respectfully submitted this 19th day of September, 2016,

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CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to David L. Donnan on September 19, 2016.

MARK B. NICHOLS, Prosecutor

Jesse Espinoza

CLALLAM COUNTY PROSECUTOR

September 19, 2016 - 1:12 PM

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